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LEGAL MEMORANDUM

TO: Mayor and City Council

FROM: Tim Ramis

DATE: October 14, 2013

RE: **Big Box Regulatory Issues**
File No. 50014-36799

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

INTRODUCTION

The City Council directed the City Attorney to provide an overview of potential code changes to achieve two policy objectives. These objectives are to, (a) prohibit overnight stays in the private parking lots of big box retailers, and (b) to require a City review and approval in association with changing big box tenants.

This memorandum provides some guidance as to the potential legal and policy considerations associated with amending the code in a manner that is not discriminatory and is narrowly tailored to achieve the desired policy objectives.

OVERNIGHT PARKING LOT USE

Concerns have been expressed with the overnight use of the parking lots associated with big box retailers. An example of activities that were discussed by the Council is the use of big box parking lots for overnight parking of recreational vehicles.

The Council generally has three options on how to proceed. It can either:

- (1) determine that the existing Tigard Municipal Code ("TMC") already prohibits the activities that are of concern;

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- (2) provide direction to staff on specific code changes that meet the Council's policy objectives; or
- (3) take no action.

1. TMC Camping Prohibition

The City Code already prohibits camping in public areas. TMC 7.80 states that,

“It is unlawful for any person to camp in or upon any sidewalk, street, alley, land, public right-of-way, transit facility or bus shelter, or any place to which the general public has access, or under any bridgeway or viaduct, unless otherwise specifically authorized by this city or by declaration by the mayor in emergency circumstances.” TMC 7.80.020.

The term “camping” is broad enough to include setting up and use of a “campsite,” meaning,

“any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire, is place, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.” TMC 7.80.010(B).

One issue that the Council can address is whether or not the existing prohibition on camping already addresses its policy objectives. If the parking lot of a big box retailer is a “place to which the general public has access,” and staying overnight in a recreational vehicle meets the definition of “campsite” (e.g. involves bedding, stove, and a vehicle), then the Council can find that overnight stays in RVs in big box retail parking lots are already prohibited by TMC 7.80.020.

Should a majority of Council find that TMC 7.80 already prohibits overnight stays in recreational vehicles in big box parking lots, the Council can provide direction to staff to enforce the code on this point.

2. Amending the TMC

Should the Council find that TMC 7.80 does not meet all of its policy objectives, it can amend the code to do so. Such an amendment could be as simple as to add “big box parking lots” to the list of places where camping is prohibited, and specify that staying in a recreational vehicle is considered “camping.”

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An additional manner of regulating the situation is to define where and how the Council would allow for overnight stays in recreational vehicles. One example of such an approach is the City of Roseburg which specifies which zoning districts people can stay in RVs, and requires a permit be obtained ahead of time. The City of Stayton, Oregon also utilizes a similar approach by prohibiting camping on public property, but allowing the Chief of Police to grant permits for use of RVs that meet certain specifications.

Should the Council desire to amend the TMC to further identify the parameters in which RV camping is allowable, the Council should provide as specific direction as possible to the City Staff. Staff can then work with the City Attorney to memorialize that direction in a specific draft amendment to the TMC and identify any legal concerns therewith. The draft amendment would be brought back to the Council at a later meeting.

3. Maintain Status Quo

Should the Council find that the current TMC does not prohibit overnight RV stays in big box parking lots, and that it does not desire to do so, the Council can decline to take action on this matter. Such a decision does not prohibit future action by the Council should there be complaints regarding RV camping or any other use of big box parking lots in the City. No formal vote is required to undertake this approach.

REGULATING BIG BOX TENANTS

Concerns have been expressed that big box development tenants are not adequately regulated by the Tigard Development Code (“TDC”). Specifically, the current TDC could allow an applicant to build a big box development without specifying what tenant will be located therein, and that the owner of an existing big box development could change tenants without a review process and approval from the City.

Under the TDC, it is likely that any big box development would be reviewed through the Site Development Review (“SDR”) process at TDC 18.360. The standards applicable to SDR review do not require an applicant to identify an intended tenant or occupant of the project, only requiring that when a tenant does move in, that they obtain a business license from the City.

It is within the power of the City to amend the SDR code to require applicants to identify intended big box tenants as part of the application process, so that any City land use approval would be limited to a specific tenant, and require additional City review and approval to change that user. Such an approach would ensure that the City has notice of what tenant will use space when the City approves an application, but could have impacts beyond that. If the Council

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decides that it is interested in pursuing this approach, the following two questions should be considered.

- Would the City have the authority to approve or deny a project based on the intended user?
- Will the requirements be limited to “big box” retail operations?

The balance of this memorandum discusses the legal and policy issues associated with these questions.

1. Would the City have the authority to approve or deny a project based on the intended user?

This question gets at the intended objective of the City in passing such regulations. Is the City trying to require that applicant only identify the intended tenant beforehand so that the City and other stakeholders are informed before the decision? Or is the City trying to establish approval criteria that are applicable to and distinguish between occupants that are within the same use category (such as “big box” retailers)?

If the requirement is simply for an applicant to identify a proposed occupant and perhaps supply a letter of intent for the space, the issue is fairly straightforward. However, if the City is trying to distinguish between different retail operations, the regulatory approach must be crafted in a manner that has a rational and legitimate purpose, and does not allow the City to make arbitrary distinctions between big box retail operations.

As noted in the prior memorandum to Council dated May 28, 2013, a case can be readily made for the policy rationale behind regulating big box retailers and their effects on the City economy (e.g. reduced market share for “mom and pop” retailers, lack of ties to the City business community, etc.). However, because any City regulation must have a rational and legitimate purpose, any regulation that seeks to distinguish between big box retailers must do so in a manner that is not arbitrary, or could result in liability to the City. As such, regulations that are more narrowly tailored to target specific retailers are not recommended.

2. Will the requirements be limited to “big box” retail operations?

The City could apply a requirement to identify intended occupants to any commercial or industrial development of any size, in the City. However, one consideration in requiring applicants to have an intended occupant is that it effectively prohibits speculative building. On the big box scale, speculative building is less common than smaller retail spaces. For example, it

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is fairly common that a proposed office building or retail complex will have identified an anchor tenant or tenants, but also be looking to create additional office or retail space that would be leased after development.

As such, any requirement to identify future tenants should be limited to only affect the kinds of development that is the source of the Council's concern. If that is big box retailers, a narrowly tailored approach is suggested, so that the City avoids creating additional requirements for smaller operations and landlords trying to change tenants when a lease expires or a business moves.

Should the Council desire to amend the TDC to require identification of intended tenants, the Council should provide as specific direction as possible to the City staff. City staff can then work with the City Attorney to memorialize that direction in a specific draft amendment to the TDC and identify any legal concerns therewith. The draft amendment would be brought back to the Council at a later meeting.

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